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Nos. 809, 810, 811

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES, PETITIONER

v.

ROBERT MORSS LOVETT

UNITED STATES, PETITIONER

v.

GOODWIN B. WATSON

UNITED STATES, PETITIONER

v.

WILLIAM E. DODD, JR.

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinions in the Court of Claims (R. 33–48) have not yet been officially reported.

JURISDICTION

The judgments of the Court of Claims were entered on November 5, 1945 (R. 33, 41, 48–49). The petition for writs of certiorari was filed on February 5, 1946, and granted on March 25, 1946. The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

The United States, against which judgments were rendered in the court below, has sought review of these cases because of the Government's belief that important constitutional issues are involved which should be determined by this Court and because *amici curiae*, representing the Congress (see *infra*, p. 8), have no independent means of access to the Court. It requested that a petition for writs of certiorari be filed.

The Solicitor General, taking the view previously adopted by the President (see *infra* n. 3) and the Attorney General (*infra* p. 8), here argues that Section 304, considered as an attempted exercise of a legislative power of removal and as imposing a disqualification for office upon the respondents, is unconstitutional. He accordingly concludes, in support of the respondents, that the judgments of the Court of Claims should be

affirmed for other reasons than those principally relied upon by the court below. The *Amici curiae* contend that the Section is a valid exercise of the legislative power and that the judgments below are wrong. The legislative branch which they represent is therefore the challenger of the judgments below.

The questions presented in this Court are:

1. Whether Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, *infra*, undertook to terminate the respondents' services in their government positions and to bar them from any Federal offices thereafter, or whether it merely prohibits disbursing agencies from paying their salaries.

2. If the former, whether Section 304 is unconstitutional as an infringement of the executive power of removal or as a bill of attainder or both.

3. Whether, in view of Section 304 and the failure of the President to appoint respondents thereunder prior to November 15, 1943, the United States incurred a legal obligation to pay respondents for services rendered after that date.

4. Whether the Court of Claims was presented with justiciable controversies.

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[1] Questions 3 and 4 are stated at the request of counsel for the subcommittee of the House Committee on Appropriations.

STATUTE INVOLVED [18]

Section 304 of the Urgent Deficiency Appropriation Act, 1943, 57 Stat. 431, 450, provides as follows:

> SEC. 304. No part of any appropriation, allocation, or fund (1) which is made available under or pursuant to this Act, or (2) which is now, or which is hereafter made, available under or pursuant to any other Act, to any department, agency, or instrumentality of the United States, shall be used, after November 15, 1943, to pay any part of the salary, or other compensation for the personal services, of Goodwin B. Watson, William E. Dodd, Junior, and Robert Morss Lovett, unless prior to such date such person has been appointed by the President, by and with the advice and consent of the Senate: *Provided*, That this section shall not operate to deprive any such person of payment for leaves of absence or salary, or of any refund or reimbursement, which have accrued prior to November 15, 1943: *Provided further*, That this section shall not operate to deprive any such person of payment for services performed as a member of a jury or as a member of the armed forces of the United States nor any benefit, pension, or emolument resulting therefrom.

[18] The applicable provisions of the Constitution are quoted in the Argument where pertinent.

STATEMENT [2]

In 1939 respondent Lovett was duly appointed the United States Government Secretary of the Virgin Islands. On August 26, 1943, he was duly appointed Executive Assistant to the Governor of the Virgin Islands and entered on duty as such on October 12, 1943 (Lovett Fdgs. 2, 4; R. 19–20, 33). On November 16, 1941, respondent Watson was duly appointed Chief of the Analysis Division, Foreign Broadcast Intelligence Service, Federal Communications Commission (Watson Fdg. 2; R. 24, 33). On December 1, 1941, respondent Dodd was duly appointed Editorial Assistant, Foreign Broadcast Intelligence Service, Federal Communications Commission (Dodd Fdg. 2; R. 29, 34).

On February 9, 1943, the United States House of Representatives (78th Cong., 1st Sess.) adopted H. Res. 105, pursuant to which a special subcommittee of the Committee on Appropriations was appointed to investigate charges that "certain persons" in the executive branch of the Government were "unfit to continue in such

[2] The court below considered and disposed of these three cases together, but made separate findings of fact with respect to each of the three respondents and numbered the findings relating to the several respondents in separate, correspondingly numbered series. Findings by number preceded by the name of a respondent refer to the designated respondent only; findings by number not preceded by the name of a particular respondent refer to all the respondents.

employment" (Fdg. 5; R. 20–21, 25–27, 30–31; 89 Cong. Rec. 734, 742). Following such investigation, the subcommittee reported to the Committee on Appropriations that respondents were "unfit" to be Government employees. The Committee approved these findings. On May 14, 1943, it submitted its report (H. Rep. No. 448, 78th Cong., 1st sess.) and offered an amendment to the Urgent Deficiency Appropriation Bill, 1943, which, with modifications not here material, was enacted as Section 304 of the Urgent Deficiency Appropriation Act, 1943, *supra* (Fdgs. 5, 6; R. 21–22, 26–28, 30–32).[3] The President did not appoint any of the respondents pursuant to the provision made for such appointment in Section 304 (Fdg. 6; R. 22, 28, 31–32).

Respondent Lovett continued in the office of Executive Assistant to the Governor of the Virgin Islands until March 13, 1944 (Lovett Fdg. 3; R. 19); respondents Watson and Dodd continued in their respective positions with the Federal Communications Commission until November 21,

[3] President Roosevelt signed the Act on July 12, 1943. On September 14, 1943, in a message to the Congress, he stated that he had felt obliged to approve the Act because it appropriated funds essential to the conduct of the activities of the Government during the recess of the Congress, but that he had done so reluctantly because he believed Section 304 to be "not only unwise and discriminatory, but unconstitutional" both as a bill of attainder and as an unwarranted encroachment upon the authority of the executive and judicial branches under the Constitution. 89 Cong. Rec. 7521.

1943 (Watson Fdgs. 3, 7, Dodd Fdgs. 3, 7; R. 24, 28–29, 32). Because of the provisions of Section 304 of the Urgent Deficiency Appropriation Act, 1943, *supra*, "and the fact that the President did not appoint [them] thereunder", none of the respondents received any salary or other compensation for services rendered by him after November 15, 1943 (Lovett Fdgs. 7–10, Watson Fdgs. 7–8, Dodd Fdgs. 7–8; R. 22–24, 28–29, 32–33). On December 3, 1943, the respondents filed their respective petitions in the Court of Claims and, on September 27, 1944, respondent Lovett filed his amended petition (R. 1–17). Respondents Watson and Dodd sought to recover the amounts of their salaries for the period from November 16 to November 21, 1943, inclusive (R. 7, 11–13, 17); respondent Lovett, the amount of his salary for the period from November 16, 1943, to March 13, 1944, inclusive (R. 1, 6–7).

On December 6, 1943, the Attorney General advised the Congress that he concurred in the President's opinion (*supra*, n. 3) that Section 304 of the Urgent Deficiency Appropriation Act, 1943, was unconstitutional, that he found it "impossible to advocate with conviction the views of the Congress", and that in the circumstances he felt "that the Congress should be afforded an opportunity to be represented by their own counsel". H. Rep. No. 1117, 78th Cong., 2d sess., pp. 3–4; S. Rep. No. 724, 78th Cong., 2d sess., p. 3.

On December 18, 1943, H. Res. 386 was agreed to by the House (78th Cong., 1st Sess.), authorizing the special subcommittee appointed by the Committee on Appropriations pursuant to H. Res. 105 "to appoint counsel to represent the United States in the Court of Claims and in any appellate proceedings resulting therefrom in the actions * * * in said Court" theretofore filed by respondents Lovett, Watson, and Dodd. 89 Cong. Rec. 10882. Counsel thus appointed by the special subcommittee appeared in the Court of Claims as *amici curiae* (R. 34) and contended, *inter alia*, that Section 304 was a valid exercise of the constitutional power of Congress; that Congress in enacting it exercised its plenary powers of appropriation; that it was neither an encroachment upon the powers of the executive branch nor a bill of attainder; and that it did not deny respondents due process of law.[4] The Department of Justice took the position that Section 304 was an unconstitutional infringement of the executive power of removal and unconstitutional as a bill of attainder.

The court below, all five members participating, was unanimous in entering judgments for the re-

[4] Special Counsel also contended that the Court of Claims lacked jurisdiction; that the claims were not of a justiciable character; and that if the court passed on the question of the constitutionality of Section 304, it must also necessarily determine whether that Section was separable from the remainder of the Act of which it was a part.

spondents (R. 33, 41–42, 44, 48–49), finding that each could recover the amount of money which had been withheld from him "solely because of the operation of said Section 304 and the fact that the President did not appoint him thereunder" (Lovett Fdg. 10, Watson Fdg. 8, Dodd Fdg. 8; R. 24, 29, 33). Chief Justice Whaley, in delivering "the opinion of the court" (R. 33), in which Judge Littleton concurred (R. 41),[1] did not pass on the questions which had been raised as to the constitutionality of Section 304 and held that Section 304 had not terminated the respondents' services (R. 36–37, 40–41), but had merely prohibited the disbursing agencies from paying their salaries (R. 37–38); that this prohibition, however, did not extend to the payment of judgments of the Court of Claims (R. 39); and that, since Section 304 had not destroyed the obligation to pay for services rendered by the respondents after November 15, 1943, they were entitled to judgment (R. 40–41).

The majority of the court below, however, in three separate opinions (R. 41, 42, 44), held that Section 304 is unconstitutional. Judges Whitaker and Madden held that it is a bill of attainder (R. 41–42, 46). Judge Whitaker found it "unnecessary to consider the other constitu-

[1] It is not clear whether or not Judge Madden also concurred in "the opinion of the court," as distinct from the result reached. See R. 44.

tional objections to it" (R. 42); Judge Madden held further that Section 304 is violative of the Fifth Amendment (R. 46–47). Judge Jones held that "Section 304 in making a permanent ban on the rights and privileges of the [respondents], exceeds the authority delegated to the Congress by the Constitution" (R. 44).

ARGUMENT

I. SECTION 304 OF THE URGENT DEFICIENCY APPROPRIATION ACT, 1943, IS AN UNCONSTITUTIONAL INFRINGEMENT OF THE EXECUTIVE POWER OF REMOVAL

A. SECTION 304 WAS ACTUALLY AN ATTEMPT TO REMOVE RESPONDENTS FROM OFFICE

The "opinion of the court" below held that Section 304 of the Urgent Deficiency Appropriation Act, 1943, had not terminated the respondents' services but had merely prohibited the disbursing agencies from paying their salaries. This holding, we believe, was clearly erroneous.

Section 304, in terms merely a restriction upon the use of appropriated funds, must be construed in accordance with the actual intention of Congress. *United States* v. *Mitchell*, 109 U. S. 146; *United States* v. *Langston*, 118 U. S. 389; *Dunwoody* v. *United States*, 143 U. S. 578; *United States* v. *Vulte*, 233 U. S. 509; *United States* v. *Dickerson*, 310 U. S. 554; *Markham et al.* v. *Cabell*, No. 76, this Term, decided December 10, 1945. It is patent that Congress by Section 304 intended to destroy the substantive obligation to pay re-

spondents their salaries and to remove them from office, and not merely to prohibit the discharge of that obligation in a particular way. Section 304 not only forbids the use of any appropriation for the payment of respondents' compensation, but also provides a particular means—namely, appointment by the President with the advice and consent of the Senate prior to November 15, 1943—by which respondents could have become entitled to compensation out of Congressional appropriations. Such a provision for appointment would have been inappropriate if the respondents were not, by Section 304, being ousted from their positions. Nor is the prohibition of Section 304 limited to appropriations contained in the Act of which it is a part or which had been made available prior to its passage. It extends also to any appropriation "which is hereafter" made available "under or pursuant to any other Act." Such language certainly suggests a complete disqualification of respondents, rather than merely a limitation upon the purposes for which appropriated funds

[*] In "the opinion of the court" below, Chief Justice Whaley and Judge Littleton indicated (R. 35) that the validity of this provision of Section 304, forbidding the use of future appropriations to pay respondents' compensation, was at least questionable; that it was not, however, before them for decision; and that its invalidity would not vitiate the entire section. Regardless of the effect of the invalidity of the future appropriations provision upon the remainder of the section it seems clear that the Section as a whole must be considered in determining the Congressional intent in enacting the Section.

may be used. Furthermore, since the mere withholding of appropriated funds without abolishing respondents' offices or removing respondents from their offices would not affect respondents' legal right to their salaries, enforceable in court (*United States* v. *Langston*, 118 U. S. 389), such a construction of Section 304 would attribute to Congress either an intention to enact a useless measure or the purpose of withholding that which it knew was due to respondents. See *Belknap* v. *United States*, 150 U. S. 588, 595.

The legislative history of Section 304 is replete with evidence that the real purpose of the Congress was to remove respondents from office. Cf. *United States* v. *Dickerson*, *supra*. H. Res. 105, 89 Cong. Rec. 734, 742, authorized a special subcommittee appointed by the chairman of the Committee on Appropriations to examine into charges that certain employes in the executive branch "are unfit to continue in such employment" because of their association with organizations "subversive to the Government of the United States". The special subcommittee, in reporting to the Committee on Appropriations, stated, with respect to respondent Lovett, its

> * * * conviction that this official is unfit to hold a position of trust with this Government by reason of his membership, association, and affiliation with organizations whose aims and purposes are subversive to the Government of the United States.

> If this official is continued in office he will be in position to propagate his subversive philosophies through control of Government money spent in the Virgin Islands and otherwise influence the native mind through his Government position. [H. Rep. 448, 78th Cong., 1st sess., p. 12.]

The subcommittee concluded that respondent Lovett "is unfit to continue in the employment of the United States" (*Ibid.*). Similar conclusions were reached by the special subcommittee with respect to respondents Watson and Dodd (*Id.*, pp. 5–7). The Committee on Appropriations approved the findings of its special subcommittee (*Id.*, p. 1) and offered an amendment to the Urgent Deficiency Appropriation Bill, 1943 (*Id.*, p. 2), which, with modifications not here material, was enacted as Section 304 of the Act.

It is thus clear that the Congressional proponents of Section 304 considered respondents unfit to hold public office because of their "subversive" activities. If Section 304 is construed as merely withholding appropriations for the payment of respondents' salaries while permitting them to hold their respective offices, it will not remedy the situation to which it was directed. It would then permit persons found to be unfit for government employment by reason of their "subversive" activities to continue in government employment and there be in a position to "propagate" their philosophies and to subvert the

Government instead of serving it. Such a paradoxical intent cannot be imputed to the Congress.

It is noteworthy that the House of Representatives, in adopting H. Res. 105, not only contemplated the enactment of legislation such as Section 304, but also contemplated its enactment as part of an appropriation bill, and, indeed, contemplated that such legislation would have the effect of "changing existing law" and therefore could not, under Clause 2 of House Rule XXI, be made part of a general appropriation bill. To overcome this obstacle and thus permit the enactment in an appropriation bill of legislation dealing with matters not germane to appropriations, the ousting of respondents from their positions, H. Res. 105 provided:

> Any legislation approved by the committee as a result of this resolution may be incorporated in any general or special appropriation measure emanating from such committee or may be offered as a committee amendment to any such measure notwithstanding the provisions of Clause 2 of Rule XXI. [89 Cong. Rec. 734.]

And it may be noted further that the Committee on Appropriations, in recommending the inclusion of Section 304 in the bill which became the Urgent Deficiency Appropriation Act, 1943, adverted to this very authority to include in an appropriation bill matter which would otherwise have been out of order under Clause 2 of House

Rule XXI (H. Rep. No. 448, 78th Cong., 1st Sess., p. 2). In these circumstances, the congressional intent to do more than cut off appropriations for the payment of respondents' salaries cannot be questioned.

B. THE POWER TO REMOVE THE INCUMBENTS OF OFFICES IN THE EXECUTIVE BRANCH IS AN EXECUTIVE FUNCTION AND MAY NOT BE EXERCISED BY THE LEGISLATURE

Section 304 embodies a device which in its implications represents a fundamental breach in the principle of separation of powers underlying our whole constitutional system. If the President is to perform his constitutional obligation to execute the laws, he must have power to control the subordinate officers through whom the executive function is administered. The principal control which the President has over executive officers is his power to remove them, and it has been said that "he is * * * Chief of the Executive only through his power of removing appointees who are recalcitrant and unwilling to follow his wishes" (Rogers, *The American Senate*, p. 48n). Any exercise of the removal power by the legislative branch necessarily interferes with the executive power and tends to subject the executive branch to the control and domination of Congress. "For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will" (*Humphrey's Executor* v. *United States*, 295

U. S. 602, 629). The independence of the executive branch could thus be undermined and the doctrine of separation of powers nullified.

We shall show herein that the removal power of Congress over executive officers is confined to its impeachment powers expressly provided for in the Constitution; that while Congress has power to fix the qualifications for certain offices and to place restrictions under certain circumstances upon the exercise of the President's removal power, the Congress may not itself, by legislative enactment (whether or not in the guise of an appropriation measure), remove persons from office.

The mode of enactment of Section 304 as a rider to an essential appropriation bill is subject to grave objections not herein stressed, since it deprives the President of opportunity to exercise his constitutional functions with respect to legislation. As a practical matter, the exigencies of the public welfare may make it impossible for the President to veto an appropriation bill containing such a rider, even though it is a clear infringement of his constitutional prerogatives. See VII Richardson, *Messages and Papers of the Presidents*, p. 531. The deliberate judgment of the nonoriginating chamber is also foreclosed by this legislative device. Thus, the Senate so strongly felt that this provision was unconstitutional that it four times rejected conference reports on the bill and only acquiesced in the fifth report because of the imperative necessity that the appropriations contained in the bill be made available to the executive departments concerned, since the appropriations for the current fiscal year had expired (89 Cong. Rec. 5602–5606, 6407–6416, 6691–6695, 6729–6738, 6839, 7003–7014). As Senator Barkley put it: "It is unfortunate that we must vote with a pistol held at our heads, because tomorrow at midnight the fiscal year ends and a new one begins" (89 Cong. Rec. 6693).

1. The Express Grant to Congress of the Impeachment Power Negatives any other Removal Power in Congress

The removal power of Congress is not a matter which the Framers of the Constitution left to interpretation or speculation. It was a subject of such moment and importance as to be dealt with expressly in the Constitution. Thus the Constitution confers upon the House of Representatives the "sole Power of Impeachment" (Art. I, Sec. 2, cl. 5); and the "sole Power to try all Impeachments" is placed in the Senate, subject to the safeguards that convictions shall be by "the Concurrence of two-thirds of the Members present" and that the judgment "shall not extend further than to removal from office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States" (Art. I, Sec. 3, cls. 6 & 7).[1] This impeachment process, we submit, was intended to be the sole means by which the legislative branch might remove the personnel of other branches.

Since the Framers dealt expressly with the removal power of Congress in the clause covering impeachment, the normal inference is that no other removal power was intended to be vested in Congress. This inference is buttressed by the

[1] Art. II, Sec. 4 renders "The President, Vice-President and all civil Officers of the United States" subject to removal from office "on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

fact that, if a direct removal power[9] by simple legislative enactment existed, the impeachment process would be rendered unnecessary and its carefully spelled-out safeguards nullified.

The proceedings of the Constitutional Convention support this conclusion. There, methods of removal by the legislative branch, other than by impeachment, were suggested for adoption and voted down. A proposal for removal of judges by joint address, a procedure having precedent in England,[10] was rejected by the Convention. II Farrand, *Records of the Federal Convention of 1787* (1911), pp. 428–429. Similarly, a proposal for removal "by the national legislature upon a request by a majority of the legislatures of the individual States" was defeated. I Farrand, *supra*, p. 78. Finally, removal by bill of attainder, a method well known to the Framers, was outlawed. See discussion, *infra*, pp. 58–63.

The debate at the Convention upon the scope of the impeachment power is also revealing, for it

[9] As used throughout this brief, the term "direct removal power" refers to a power under which the legislature could by legislative enactment remove a named incumbent from office, as distinguished from (1) a power to remove an officer by impeachment, or (2) a power to require legislative consent to a proposed removal by the President, or (3) a power to limit or control the President's removal power by specifying or limiting the grounds upon which executive officers may be removed.

[10] Act of Settlement of 1701 (12 and 13 Wm. III c. 2); compare V Thorpe, *Federal and State Constitutions* (1909), p. 3088.

shows a broadening of the power in order to meet all the needs of legislative removal, but at the same time a refusal to grant a blanket removal power to the legislature. At one stage of the Convention the proposal was made that the impeachment power might only be invoked in cases of "Treason & bribery." Upon objection that this provision "will not reach many great and dangerous offences" and that such offences could not be dealt with by bills of attainder, impeachment was expanded to cover "other high crimes & misdemeanors." At the same time, however, impeachment was not extended to "maladministration", since, as Madison pointed out, that would have created the "equivalent to a tenure during pleasure of the Senate" (II Farrand, *supra*, p. 550).

The English constitutional system as it existed at the time of the Framing of the Constitution also casts light upon our problem. *Ex parte: William Wells*, 18 How. 307, 311; *Ex parte Grossman*, 267 U. S. 87, 110; *Myers v. United States*, 272 U. S. 52, 118. At this time the power to remove executive officers was vested in the Crown.[11] Par-

[11] Salaries of civil officials were defrayed from the Civil List. A lump sum was voted at the beginning of each reign which was entirely at the King's disposal, and he could remove any person from office merely by striking him from the List. Indeed, no distinction was made between the King's personal and domestic expenditures and payments of salaries to officials (Keir, *Constitutional History of Modern Britain*, pp. 299, 303, 304). George III made removals without consulting either Parliament or his own ministers (I May, *Constitutional History of England*, ch. 1).

liament, of course, had the power to impeach officials (see *e. g.* 2 State Trials 1087; 6 State Trials, 291; 16 State Trials 767), and in times of great political upheaval enacted bills of pains and penalties or attainder which deprived officials of their offices (see discussion, *infra*, pp. 60–62). Parliament also appointed committees of inquiry to investigate the conduct of government officials, but these only resulted in addresses to the Crown for removal. (I Anson, *Law and Custom of the Constitution*, p. 365 *et seq.*; II Todd, *Parliamentary Government*, p. 860 *et seq.*). But Parliament had no way to remove an official by forbidding payment of his salary. The fact that the only way in which Parliament could remove an official was through impeachment or a bill of pains and penalties and the fact that the latter practice was outlawed by the Framers through the prohibition against bills of attainder strongly suggest that under the Federal Constitution Congress was not intended to have the power to remove executive officials otherwise than by impeachment.

2. The Vesting of the Executive Power in the President and the Specific Grant to Him of the Power to Appoint Confer upon Him the Power to Remove.

The impeachment provisions aside, the absence of a direct removal power in Congress is indicated by the specific grant to the executive of the general appointive power. Art. II, Sec. 2,

cl. 2 of the Constitution provides that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." It is well established that, in the absence of specific provisions to the contrary, the power of removal is an incident of the power of appointment.[12] Hence, under the Constitution, the removal power rests in the President and not in Congress.

The same conclusion follows, in the absence of countervailing considerations from the provision of Art. II, Sec. 1 of the Constitution, that "The executive Power shall be vested in a President". The background of this provision shows that the Framers intended to include the power to appoint and to remove. At the Convention, the scope of

[12] *Matter of Hennen*, 13 Pet. 230, 259-260; *Keim* v. *United States*, 177 U. S. 290, 293, 294; *Reagan* v. *United States*, 182 U. S. 419, 424; *Shurtleff* v. *United States*, 189 U. S. 311, 314-315; *Burnap* v. *United States*, 252 U. S. 512, 515; *Wallace* v. *United States*, 257 U. S. 541, 544; *Myers* v. *United States*, 272 U. S. 52, 119 (1926); 8 Op. A. G. 223, 232; Mechem, *Public Offices and Officers* (1890) Sec. 445. See 1 *Annals of Congress* 376, 381, 491, 492.

the executive power was first treated in the Seventh Resolution of the Virginia Plan. This gave to the executive "the Executive rights vested in Congress by the Confederation" (I Farrand, *supra*, p. 21), which presumably included the power of removal assumed by the Congress under the Confederation, Articles of Confederation, Art. IX; 4 Journals of the Continental Congress (Lib. of Cong. ed.), 361; 13 *id.* 32–33; 14 *id.* 542, 712, 714; 18 *id.* 1085, 1115; see *Myers* v. *United States*, 272 U. S. 52, 110. The Committee of the Whole House modified this resolution to provide for a national executive of one person with power to carry into execution the national laws and to appoint to offices in cases not otherwise provided for (I Farrand, *supra*, p. 230). This was referred to the Committee of Detail, which recommended that the executive power should be vested in a president and that he should commission all the officers of the United States and appoint officers in all cases not otherwise provided for by the Constitution (II Farrand, *supra*, p. 185). It was only after the great compromises in the Convention giving the larger States equality of representation in the Senate and providing for the election of the President not by Congress but by an electoral college that the smaller States, led by Roger Sherman, fearing that the President would constantly be chosen from one of the larger States, demanded and obtained a change by which

the appointment of all officers was made subject to the Senate's advice and consent rather than vested in the President without restriction (*Myers* v. *United States*, 272 U. S. 52, 110, 111). But the appointive power, and the removal power incident thereto, remained in the executive.

This conclusion is reinforced by the action of the First Congress in so modifying the Northwest Ordinance of 1787 that the executive powers theretofore exercised by Congress, including the power of removal, were transferred to the President (Act of August 7, 1789, 1 Stat. 50, 53; see discussion, *infra*, p. 36). Moreover, in 1789, as now, the power of appointment and removal of officers clearly was considered an executive function in England. See *Myers* v. *United States*, 272 U. S. 52, at p. 118. Cf. *Ex parte Grossman*, 267 U. S. 87, 108–111; *Ex parte: William Wells*, 18 How. 307. And the debates in the first Congress in 1789 leave no doubt as to the view of the Framers that "the power of displacing" was an executive power. 1 *Annals of Congress* 463; 4 Op. A.-G. 603, 609–610. See discussion, *infra*, pp. 34–36.

In any event, this Court has so decided. *Myers* v. *United States*, 272 U. S. 52, squarely establishes that the power of removal of inferior executive officers is vested exclusively in the executive branch and that an assumption of that power by Congress is beyond its constitutional functions. The case involved the removal from office of a

first class postmaster by the Postmaster General, with Presidential approval, but without referral to the Senate, despite a statutory provision for a four-year term of office, subject to removal "by the President by and with the advice and consent of the Senate" (Act of July 12, 1876, 19 Stat. 78, 80). In holding the provision for Senatorial consent to be an unconstitutional invasion of the executive province, this Court observed (272 U. S. at pp. 117–118, 119, 122):

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws. The further implication must be, in the absence of any express limitation respecting removals, that as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he cannot continue to be responsible. Fisher Ames, 1 Annals of Congress, 474. It was urged that the natural meaning of the term "executive power" granted the President included the ap-

> pointment and removal of executive subordinates. If such appointments and removals were not an exercise of the executive power, what were they? They certainly were not the exercise of legislative or judicial power in government as usually understood.
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> The reason for the principle [that the power of appointment carries with it the power of removal] is that those in charge of and responsible for administering functions of government who select their executive subordinates need, in meeting their responsibility to have the power to remove those whom they appoint * * *. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

The opinion further pointed out that the constitutional prerogatives of Congress with respect to appointment and removal of executive officers are limited to the Senate's confirmation of President's nominations to offices requiring such confirmation and to vesting the appointing power with respect to inferior officers in the President, the courts, or the heads of departments. The

granting of these specific powers to Congress, this Court added, excludes by implication any power in it to control the removal of officers, except that Congress, when it vests in the executive branch alone the power of appointing inferior officers, may by general provision limit and regulate executive removal of such officers.

Rejecting the argument that a direct removal power in Congress might be found in the "Necessary and Proper" clause of the Constitution (Art. I, sec. 8), this Court observed (272 U. S. at 127):

> A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government. The inclusion of removals of executive officers in the executive power vested in the President by Article II, according to its usual definition, and the implication of his power of removal of such officers from the provision of section 2 expressly recognizing in him the

> power of their appointment, are a much more natural and appropriate source of the removing power.[18]

This Court also declined to find a direct removal power for Congress in the power to "vest" the appointment of inferior officers (Art. II, Sec. 2, cl. 2, *supra*, pp. 21–22), the opinion stating (272 U. S. at 161):

> The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this Court has recognized that power. The Court also has recognized in the *Perkins*

[18] Of course, under the "Necessary and Proper" clause, Congress may prescribe many of the incidents of Federal employment. Compare *Crenshaw* v. *United States*, 134 U. S. 99, 106. Congress may abolish an office, or the agency in which the office exists (Cf. *Ware* v. *United States*, 4 Wall. 617), and may reduce its emoluments (Cf. *Butler* v. *Pennsylvania*, 10 How. 402, 416) or determine the qualifications for appointment thereto. *Myers* v. *United States*, 272 U. S. 52, 128; III Willoughby, *Constitutional Law* (2d ed. 1929), Sec. 992; Corwin, *The President* (2d ed. rev. 1941) p. 70; 13 Op. A. G. 516, 520. And Congress may, with respect to some positions impose limitations upon the power to remove an incumbent once duly appointed. *Humphrey's Executor* v. *United States*, 295 U. S. 602; *Blake* v. *United States*, 103 U. S. 227; *Shurtleff* v. *United States*, 189 U. S. 311, 314; *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Priddie* v. *Thompson*, 82 Fed. 186 (C. C. W. Va.). See *infra*, pp. 30–31.

> case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the Court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers."[11]

The dissenting Justices in the *Myers* case agreed with the majority of the Court that the act of removal itself (as distinguished from prescribing the condition under which the executive may remove an incumbent) is an executive and not a legislative function (*Myers* case, pp. 186, 245). See also *Springer* v. *Philippine Islands*, 277 U. S. 189, 202; *Crenshaw* v. *United*

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[11] The power to "vest" appointment of inferior officers is otherwise carefully circumscribed, in that Congress may not under this clause vest the power of appointment in itself or in either of its branches. *United States* v. *Ferreira*, 13 How. 40, 50–51; *Shoemaker* v. *United States*, 147 U. S. 282, 300–301; II Story, *Commentaries* (5th ed. 1891), Sec. 1535; III Willoughby, *Constitutional Law* (2d ed. 1929) Sec. 991; 3 Op. A. G. 188; 12 *id.*, 32, 37; 13 *id.* 516.

States, 134 U. S. 99, 109.[15] And writers critical of the *Myers* decision agree that Congress has no power to remove the incumbent of an executive office.[16]

In the later case of *Humphrey's Executor* v. *United States*, 295 U. S. 602, this Court held that Congress could constitutionally restrict the President's power of removal of a member of the Federal Trade Commission by limiting the causes for removal to inefficiency, neglect of duty, or mal-

[15] Many states have also held that the appointing power is executive in nature, and unless conferred on the legislature by the constitution, cannot be exercised by that body. *Taylor* v. *Stevenson*, 2 Idaho 166, 9 Pac. 612; *State ex rel. Jameson* v. *Denny*, 118 Ind. 382, 21 N. E. 252; *City of Evansville* v. *State ex rel. Bland*, 118 Ind. 426, 21 N. E. 267; *State ex rel. Yancey* v. *Hyde*, 121 Ind. 29, 22 N. E. 644; *State ex rel. Worrell* v. *Peelle*, 121 Ind. 495, 22 N. E. 654; *Pratt* v. *Breckinridge*, 112 Ky. 1, 65 S. W. 136; *People ex rel. Nichols* v. *McKee*, 68 N. C. 429; *People ex rel. Walker* v. *Bledsoe*, 68 N. C. 457; *State ex rel. Howerton* v. *Tate*, 68 N. C. 546; *State ex rel. Atty. Gen.* v. *Keenan*, 7 Ohio St. 546; *McCornick* v. *Thatcher*, 8 Utah 294, 30 Pac. 1091; *State ex rel. White* v. *Barker*, 116 Iowa 96, 89 N. W. 204; *Taylor* v. *Commonwealth*, 3 J. J. Marshall (Ky.) 401; *Justices* v. *Harcourt*, 4 B. Mon. (Ky.) 499; *Murphy* v. *Webster*, 131 Mass. 454; *Attorney General* v. *Barnum*, 167 Mass. 477, 46 N. E. 1; *Opinion of the Justices*, 302 Mass. 605, 620, 621, 19 N. E. (2d) 807.

[16] Hart, *Tenure of Office Under the Constitution*, pp. 186, 301, 304; Hart, *The Bearing of Myers* v. *United States* upon the Independence of Federal Administrative Tribunals, 23 Am. Pol. Sci. Rev. 657, 665; Donovan and Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 Corn. L. Q. 215, 228; Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 Col. L. Rev. 353, 392, 397.

feasance in office. The basis for the decision was that the Federal Trade Commission "cannot in any proper sense be characterized as an arm or an eye of the executive. * * * the commission acts in part quasi-legislatively and in part quasi-judicially" (p. 628). The Court reaffirmed, however, the basic principle of the *Myers* case that with respect to an officer in the executive branch, the executive has the "exclusive and illimitable power of removal" (p. 627).[17]

The *Humphrey's* decision recognizes that quasi-legislative and quasi-judicial tribunals occupy a special position, and that limitations upon the unrestrained executive power of removal are justified to preserve the Commissioners' independence in the exercise of non-executive functions. Thus, when Congress creates an office with quasi-legislative or quasi-judicial functions, to the faithful performance of which impartiality and freedom from political control are obviously important, its constitutional authority extends to protecting such an official against control by the executive through unqualified exercise of the removal power. But the *Humphrey's* case nowhere suggests that any officer—even one exercising quasi-legislative or quasi-judicial power—may be directly removed by Congress itself.

[17] Counsel for the plaintiff in the *Humphrey's* case and Senator Pepper as *amicus curiae* in the *Myers* case conceded that the act of removal was an executive, not a legislative function (295 U. S. at 608, 609; 272 U. S. at 68).

In any event, the *Humphrey's* case clearly has no application here, since respondent Lovett's position as Executive Assistant to the Governor of the Virgin Islands was a purely executive office without quasi-legislative or quasi-judicial functions.[18] And even though respondents Watson and Dodd held positions in an agency whose functions included quasi-legislative and quasi-judicial matters,[19] they were staff members concerned with exclusively executive matters. Both were engaged in work for the Foreign Broadcast Intelligence Service, analyzing foreign broadcast propaganda (R. 24, 29). This work did not involve regulatory functions, but simply administra-

[18] The Governor of the Virgin Islands is vested with "The executive power of the Virgin Islands and of the municipalities thereof * * *" (Act of June 22, 1936, Sec. 20, 49 Stat. 1807, 1812; 48 U. S. C. 1405s). Respondent Lovett's official duties as the Governor's assistant had no relation either to the legislative branch of the government of the Virgin Islands (which is divided between Congress and municipal councils) or to the judicial branch of that government (which consists of a district court and inferior courts established by local law). Organic Act of June 22, 1936, 49 Stat. 1807, as amended, 48 U. S. C. 1405 et seq., secs. 5, 6, 7, 25, 26.

[19] The statutory functions of the Federal Communications Commission include making recommendations to Congress as to proposed legislation, fixing rates for interstate and foreign communication by wire or radio, granting monetary relief to persons damaged by carriers' violations of the Federal Communications Act, and granting and revoking licenses for radio transmission. Federal Communications Act of 1934, 48 Stat. 1064, 47 U. S. C. 151 et seq., secs. 205 (a), 209, 220 (j), 303, 307, 312.

tion and collaboration with executive agencies such as the Office of Facts and Figures, the Coordinator of Information, and the Coordinator of Inter-American Affairs. *Seventh Annual Report, Federal Communications Commission* (1941) pp. 1–6. Hence respondents Watson and Dodd were in substantially different positions from those held by the Commissioners of the Federal Communications Commission. They must be treated in the same manner as Dr. Lovett, who unquestionably held an office in an executive department; and the Humphrey's decision has no applicability to them.

It is clear therefore that both the *Myers* and the *Humphrey's* cases deny to the Congress any direct power of removal of inferior executive officers such as respondents. Both decisions thereby give full weight to the constitutional provisions vesting the executive power in the President and specifically granting to him the general appointive power, to which the removal power is normally an incident.

3. The Practice under the Constitution Negatives any Direct Removal Power in Congress

From the foundation of our Government both the Congress and the chief executive have, with rare exceptions, consistently recognized that the power to remove an executive official is in the executive and not in the legislative branch. At many periods in our history Congress and the

President have engaged in bitter controversies over the fitness of particular executive officers to hold office. Yet never heretofore, except in one instance only four years ago, has Congress resorted to the device embodied in Sec. 304. This uniform course of practice is highly persuasive evidence of the true construction of the constitutional provisions discussed above, particularly when it includes the practice followed by those Framers of the Constitution who afterward participated in the Government.[20]

In the First Congress in 1789, there arose in connection with the bill establisihng a Department of Foreign Affairs, the question whether Congress should recognize and declare that under the Constitution the President had the power to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. Many of the leading figures of the Constitutional Convention were members of the First Congress. The debate on this issue was exhaustive and expressed all possible points of view. The bill as passed explicitly recognized the authority of the President to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. This action was taken to be a definitive construction of the Constitution as vesting the removal power in the executive. 1 Annals of Congress 463, 464, 495, 496, 499, 581, 582; I Bancroft, *History of the*

[20] See *Myers* v. *United States*, 272 U. S. 52, 175.

Constitution of the United States, p. 192. As Mr. Madison observed: "The decision that is at this time made, will become the permanent exposition of the Constitution * * *" (1 Annals of Congress 496).

Because of the variety of views expressed in this historic debate, there is some difference of opinion as to the inferences to be drawn from the votes on the measure. Compare the majority and dissenting opinions in the *Myers* case, pp. 111–136, 193–199, 284, 285. But no one has contended that even those members of Congress who took the most extreme position in favor of Congressional control over the power of removal went beyond the proposition that Congress might impose conditions upon the executive's power to remove inferior officers. Cf. *United States* v. *Perkins,* 116 U. S. 483. It has never been suggested that any member of the First Congress considered that Congress could go beyond this, as it has attempted to do in the enactment of Section 304, and itself effect a legislative removal.

The legislative decision of 1789 was immediately accepted and acted upon as a binding construction of the Constitution (even though some felt that as an *a priori* proposition the Constitution was susceptible of a different construction). Thus, Chief Justice Marshall in his *Life of Washington,* first published in 1807, stated that "As the bill passed into a law, it has ever been considered as

a full expression of the sense of the legislature on this important part of the American constitution" (Vol. II (2d ed.), p. 162). Similarly, Chancellor Kent writing to Daniel Webster in 1830 observed that "it is too late to call the President's power in question, after a declaratory act of Congress and an acquiescense of half a century" (I *Private Correspondence of Daniel Webster* (1857 ed.), p. 487). And in his *Commentaries* Chancellor Kent concluded, "It may now be considered as firmly and definitely settled, and there is good sense and practical utility in the construction" (I Kent, *Commentaries,* Lecture 14, p. 310). Cf. II Story, *Commentaries on the Constitution,* secs. 1543, 1544; IV Webster, *Works,* p. 198.

A few days after enacting the bill establishing the Department of Foreign Affairs, the First Congress passed a statute which adapted the Northwest Ordinance of 1787 to the Constitution. The Northwest Ordinance had provided for the appointment and removal of executive territorial officers by the Congress under the Articles of Confederation. The amendatory act, however, expressly gave to the President the powers of removal from office which under the Northwest Ordinance were vested in the Congress. 1 Stat. 50, 53.

The only early statutes ever alleged to constitute Congressional removals from office are two so characterized by Mr. Justice McReynolds in his

dissenting opinion in the *Myers* case (pp. 186, 190, 214, 215)—the first general Tenure of Office Act of May 15, 1820 (3 Stat. 582), and the Act of July 2, 1836 (5 Stat. 80). We submit, however, that this view is erroneous. The Act of May 15, 1820, provided that certain named officials, among them district attorneys and collectors of the customs, should be appointed for a term of four years and provided that the terms of existing incumbents of those offices (who had been appointed without term to serve at will) should expire on specified dates. The provisions of this Act were not directed against any of the existing incumbents as such; their purpose was to adopt a policy of giving the specified offices a fixed term of four years. Unless a limitation had been fixed upon the terms of the incumbents then in office, they would have continued to serve for life, unless removed by the President and the policy of the Act would have been ineffective for an indefinite period.

The Act of July 2, 1836, authorized the President to appoint deputy postmasters for certain post offices and provided they should hold office for a term of four years unless sooner removed by the President. Contrary to the statement of Mr. Justice McReynolds, the Act was not applicable to deputy postmasters then in office and, of course, could not be said to have constituted a legislative removal of them. While the Act did pro-

vide that if any mail contractor entered into a combination to restrain bidding for mail contracts "he may be forthwith dismissed from the service of the Department, It expressly conferred this dismissal power upon the Postmaster General (5 Stat. 87). Congress thus recognized that the power of dismissal was in the executive branch, and merely prescribed a condition upon which the Postmaster General might dismiss certain officials.[21]

There have been several instances in which the Senate or members of Congress, entertaining opinions as to the fitness of particular persons to hold office, have attempted to influence the President with respect to their removal. The fact that no attempt was made to remove any of these officials by legislative action is persuasive of a belief in Congress that it lacked the power to do so. In 1794 a party caucus of Senate and House members unsuccessfully sought to persuade President Washington to recall Gouverneur Morris as Ambassador to France and to replace him by Aaron Burr. Haynes, *Senate of the United States,* pp. 725, 812. In 1835, upon Presi-

[21] Similarly, the Act of January 31, 1823 (3 Stat. 723), provided that officers failing to account for public funds should be dismissed by the President. This again recognized that while Congress might prescribe conditions upon which the power of removal should be exercised, the function of removal was executive not legislative.

dent Jackson's refusal to comply with a Senate resolution requesting his reasons for removing an officer, he categorically stated that "The President * * * possesses the exclusive power of removal" and that while he is liable to impeachment if "he abuses this power", "on no principle known to our institutions can he be required to account for the manner in which he discharges this portion of his public duties, save only in the mode and under the forms prescribed by the Constitution" (III Richardson, *Messages and Papers of the Presidents,* p. 133).

In the Act of July 17, 1862, Congress requested the President to discharge from the military service any officer for any cause which in his judgment rendered such officer unsuitable for public service (12 Stat. 594, 596). By this Act, Congress again recognized that the power of removal was in the President; the purpose of the Act was to stimulate by Congressional declaration during the crisis of the Civil War the exercise of the authority of the President. 15 Op. A. G. 421; *Blake* v. *United States,* 103 U. S. 227, 234. In 1862, a caucus of Republican Senators passed a resolution that the welfare of the country required the removal of Secretary of State Seward, and a committee of Senators urged his removal upon President Lincoln, stating that the emergency was serious enough to require their "friendly counsel."

President Lincoln declined their advice.[22] Haynes, *Senate of the United States*, pp. 812–815.

Accordingly, up to the period when intense differences of views over the reconstruction policy resulted in bitter political controversy between President Johnson and the Congress, climaxing the conflicts in our history between the executive and the legislative branches, both Congress and the Presidents had consistently recognized that under the Constitution the power of removal was vested solely in the executive.

As a part of the effort of Congress to impose its will upon President Johnson with respect to reconstruction policy, there was enacted a provision in the Act of March 2, 1867, 14 Stat. 485–487, to the effect that all orders relating to military operations by the President or the Secretary of War should be issued through the General of the Army, who should not be removed or relieved from command, except at his own request, without previous approval of the Senate. The Tenure of Office Act of March 2, 1867, 14 Stat. 430, was also enacted, providing that all officers appointed by and with the consent of the Senate should hold office until their successors should have been in like manner appointed and qualified and that certain heads of departments, including

[22] See also the account *infra*, pp. 41–42, of a proposed House resolution of 1867, that it was the sense of the House that the collector of the port of New York should be removed from office.

the Secretary of War, should hold office during the term of the President by whom appointed and one month thereafter subject to removal by consent of the Senate. As is well known, President Johnson vetoed the Tenure of Office Act (VI Richardson, *Messages and Papers of the Presidents*, p. 492), and upon its passage over his veto, refused to comply with it and removed Secretary of War Stanton, an action which brought about his impeachment and trial. See *Parsons* v. *United States*, 167 U. S. 324, 340.

The constitutionality of these statutes, enacted as they were in a passionate partisan conflict which is now generally recognized as a deplorable blot upon our history, was never judicially determined. But this Court clearly indicated in the *Myers* case (at p. 167) that it considered them unconstitutional in view of the settled constitutional construction, vesting the removal power in the executive. In any event, the controversy between President Johnson and Congress demonstrates that even during a period of extreme views, Congress did not assert for itself the power of removal of executive officers.[23]

[23] Immediately upon the inauguration of President Grant, Congress repealed in part the Tenure of Office Act, by the Act of April 5, 1869, 16 Stat. 6. In his first message to Congress, President Grant recommended the entire repeal of the Act on the ground that its provisions were an unconstitutional infringement of the Executive's power of removal. VII Richardson, *Messages and Papers of the Presidents*, p. 38. Finally, by the Act of March 3, 1887, 24 Stat. 500, the Act was repealed.

On March 21, 1867, the Committee on Public Expenditures of the House reported a resolution "that Henry A. Smythe should be immediately removed from the office of collector of the port of New York; and that the Clerk of the House cause a certified copy of this resolution to be laid before the President of the United States" (77 Cong. Globe, p. 255). This resolution did not purport to remove Mr. Smythe from his position; it went no further than a statement by the House that the Executive branch should remove him. Yet even this, the House believed, exceeded its powers (*id.* pp. 255, 256, 282–283, 335); and an amendment was offered, completely changing the resolution into one for impeachment. But this too was found objectionable, since no investigation had been made to determine whether there were grounds for impeachment. The resolution was therefore amended to refer the matter back to the Committee on Public Expenditures for an investigation and, if they deemed guilt established, to prepare articles of impeachment (*id.* pp. 284–285, 289–290). It does not appear that the Committee ever reported. See III Hinds' *Precedents of the House of Representatives* (1907) pp. 1006–1007.

In 1886 President Cleveland denied the right of the Senate to request his reasons for removing certain officials, stating that "the power to remove or suspend such officials is vested in the President

alone" and that "when the Constitution by express provisions superadded to [the Senate's] legislative duties the right to advise and consent to appointments to office and to sit as a court of impeachment, it conferred upon that body all the control and regulation of Executive action supposed to be necessary for the safety of the people" (VIII Richardson, *Messages and Papers of the Presidents,* p. 379).

In 1924, in connection with the Teapot Dome scandal, the Senate passed a resolution calling on the President to request the resignation of the Secretary of the Navy (65 Cong. Rec. 2245). Several Senators contended that the resolution was an unwarranted interference with the Executive (65 Cong. Rec. 1719, 1730, 1734, 1981–1982, 2072–2080, 2169), and President Coolidge declined to recognize the resolution, stating that "The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an Executive function. I regard this as a vital principle of our Government" (65 Cong. Rec. 2225).

From 1921 to 1932 Secretary of the Treasury Mellon was the target of many Senate resolutions intended to bring about his resignation (65 Cong. Rec. 4014, 5243; 69 Cong. Rec. 5054, 5145–5155; 71 Cong. Rec. 1007–1028). But his Senatorial opponents never considered that the device of legislative removal was open to them. When

during the same period, the Senate attempted to recall its confirmation of a Presidential nomination to the Federal Power Commission, President Hoover refused to recognize the validity of the recall, stating that he could not "admit the power in the Senate to encroach upon the Executive function by removal of a duly appointed executive officer under the guise of reconsideration of his nomination" (74 Cong. Rec. 1929; see *United States* v. *Smith*, 286 U. S. 6).[24]

The dissent of Mr. Justice Brandeis in the *Myers* case contains an exhaustive review of Federal statutes prescribing qualifications for appointment to particular inferior offices and qualifying the President's removal power (*Myers* case, pp. 262–282). As the majority pointed out (p. 170), the failure of the Presidents to veto many of these acts may perhaps be explained, not by Presidential acquiescence, but by the fact that the measures were riders to otherwise valuable legislation which could not be vetoed without serious injury to the public wel-

[24] A comprehensive study of Congressional investigative committees cites numerous instances in which such committees have uncovered maladministration or corruption on the part of executive officers and many cases where resolutions were introduced to force the hand of the President to remove the official concerned. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153. Not a single instance is cited of an attempt by Congress itself to remove the officer, whether by direct fiat or by withholding an appropriation for his salar

fare. And it is noteworthy that not a single one of the statutes cited went beyond the constitutional power of Congress, as established in *United States* v. *Perkins,* 116 U. S. 483, to limit and regulate the executive power of removal. No effort was made to assert a power of removal by the legislature itself.

The only statutes in which Congress has explicitly asserted a right itself to remove officials are two relatively recent ones establishing the General Accounting Office and the Tennessee Valley Authority. Under the Budget and Accounting Act, the Comptroller General and Assistant Comptroller General may be removed, not only by impeachment, but by joint resolution of Congress for certain specified causes. Act of June 10, 1921, 42 Stat. 20, 23–24, 31 U. S. C. 43.[25] This Act, however, is not a precedent for Congressional removal of executive officers, for the Comptroller General is not primarily a part of the executive branch, but is an agent of Congress whose function it is to check upon compliance with the laws by the executive branch of the Government. III Willoughby, *Constitutional Law of the United States* (2d ed.), p. 1526. The Comptroller Gen-

[25] In its original form the Budget and Accounting Act of 1921 provided for the removal of the Comptroller General by concurrent resolution and was vetoed by President Wilson solely because he regarded this provision as an unconstitutional limitation upon the Presidential power of removal. 59 Cong. Rec. 869.

eral, or his predecessors in the same type of office, have been regarded since the adoption of the Constitution as occupying a unique position. Act of September 2, 1789, 1 Stat. 65; Act of March 3, 1817, 3 Stat. 366; Act of July 31, 1894, 28 Stat. 162, 205.[26] The Act creating the General Accounting Office specifically prescribes that it "shall be independent of the executive departments" (42 Stat. 23, 31 U. S. C. 41). Cf. *Humphrey's Executor* v. *United States*, 295 U. S. 602.

The Tennessee Valley Authority Act, which authorizes presidential removal of directors who make appointments or promotions on the basis of a political test or qualification, contains a separate provision that any director "may be removed from office at any time by a concurrent resolution" of the Congress (48 Stat. 60, 63, 16 U. S. C. 831c(f), 831e). The origin of this provision is obscure, for it was not referred to in either the committee reports or the debates on the bill. See *Note*, 51 Harv. L. Rev. 1246; S. Rep. No. 23, 73d Cong., 1st sess.; H. Rep. No. 130, 73d Cong., 1st sess. The validity of the provision has been questioned (Corwin, *The President*, *supra*, p. 95).

[26] Madison recognized that the Comptroller's office exercised a peculiar blend of governmental powers and was therefore properly subject to greater control by the legislative branch. See 1 Annals of Congress 611–612, 614. See also 1 Op. A. G. 624, 629; VIII Hamilton, *Works* (1904 ed.), p. 548; Taft, *Our Chief Magistrate and His Powers* (1916), pp. 81, 125–126.

The only instance thus far of removal of a Tennessee Valley Authority director by the President has been on a ground other than that specified in the Act as a basis for Presidential removal. See *Morgan* v. *Tennessee Valley Authority*, 115 F. 2d 990 (C. C. A. 6), certiorari denied, 312 U. S. 701.[27]

In a few recent instances, members of Congress have advocated the device employed in Section 304, but have been unsuccessful. In 1925, when the House Appropriations Committee reported out the War Department Appropriation bill with amendments providing that no part of the appropriation which it contained should be paid to two named Army officers, the House recognized that these provisions were unconstitutional and voted down the amendments. 65 Cong. Rec. 4744, 5031–5036, 5041–5043. During Senate consideration of the 1940 Interior Department Appropriation bill, an amendment, barring use of any part of the appropriation to pay the salary of a named official, was likewise defeated. 84 Cong. Rec. 4308–4346. In the Department of the Interior Appropriation bill for 1942 (H. R. 4590, 77th Cong., 1st sess.), a provision against use of the appro-

[27] It has been suggested that the Tennessee Valley Authority is a legislative agency. Larson, *Removal Power of the President*, 16 Tenn. L. Rev. 259, 277. And see *Ashwander* v. *United States*, 297 U. S. 288, 326–332. Cf. the statement of Senator Norris that "The very theory of the Tennessee Valley Authority Act itself was to make the organization independent of any Department, independent of any President" (83 Cong. Rec. 3474).

priation to pay a named employee of that department was eliminated in the Senate. 87 Cong. Rec. 4677; H. Rep. No. 773, 77th Cong. 1st sess., p. 10. Again, in November, 1942, the House Committee on Agriculture reported out a bill to aid agriculture in Puerto Rico (H. R. 7505) with a clause that "any appropriation made pursuant to this Act shall be conditioned that the funds shall not become available at any time during the service of the present Governor of Puerto Rico."; but there was no debate on the bill and it died in that Congress (H. Rep. No. 2641, 77th Cong., 2d sess., p. 1). In the Independent Offices Appropriation Bill for 1943 (H. R. 6430, 77th Cong., 2d Sess.), the Senate eliminated a House provision that no part of the appropriation should be used to pay the compensation of respondent Watson. 88 Cong. Rec. 3997–4004; H. Rep. No. 2259, 77th Cong., 2d sess., p. 3.

The only instance prior to Section 304 in which legislation was enacted with a provision withholding the use of an appropriation to pay the salary of a named person was contained in the Emergency Relief Appropriation Act for 1942, 55 Stat. 396. Shortly thereafter, the House Appropriations Committee recognized the impropriety of this provision and attached a rider to the Third Supplemental Defense Appropriation bill for 1942 repealing it. H. R. 6159, 77th Cong., 1st sess. However, the Chair sustained a point of

order that the rider was legislation in an appropriation bill, and no opportunity was presented for a record vote on the repealer. 87 Cong. Rec. 9494.

The foregoing review of our constitutional practice establishes that, with minor exceptions, it has been consistently believed for over 150 years that the power to remove from office is vested in the executive alone; that in the case of inferior executive officers the Congressional control over removal is limited to restricting by legislation the executive's power of removal; and that Congress may not constitutionally remove such officials from office either by an act of removal or by the device of withholding the availability of appropriations to pay their salaries.

4. The Spending Power Does Not Embrace a Legislative Removal Power

It cannot validly be maintained that the constitutional power of Congress, "To lay and collect Taxes * * * to pay the Debts and provide for the common Defence and general Welfare of the United States" (Art. I, Sec. 8, cl. 1) embraces a power to remove officers of the executive branch. We recognize, of course, that the spending power extends beyond the powers elsewhere conferred by the Constitution, and that conditions may be included in legislation governing the expenditure of appropriated funds. But we contend that such

conditions may not be made the vehicle of overcoming limitations which are attached to Congressional power as a whole by other provisions of the Constitution. Such has been the clearly stated view both of this Court and of other courts which have considered the same problem under state constitutions.

The first case in which this Court had occasion clearly to state the scope of the spending power and the related power to tax was, of course, *United States* v. *Butler,* 297 U. S. 1. Both the majority and dissenting opinions set forth the broad range of the power to tax and spend and asserted that it has recognizable limits. 297 U. S. at 67, 87. The opinions differed as to the sweep of the economic powers of the Federal Government and of the spending power itself; but that the spending power may not be used to subvert the constitutional scheme of government was expressly recognized. Again in *Cincinnati Soap Co.* v. *United States,* 301 U. S. 308, 313, the Court, while sustaining a tax and an accompanying appropriation of the resulting funds as valid, and while asserting the broad discretion of Congress in respect to taxing and spending, recognized that "plain cases" of unconstitutionality may arise. In *Steward Machine Co.* v. *Davis,* 301 U. S. 548, and *Helvering* v. *Davis,* 301 U. S. 619, inquiry was made whether the purposes of the taxes there involved were within the power of Congress to promote the gen-

eral welfare, as of course they were. 301 U. S. at 586–593; 301 U. S. at 640–645. The opinion in the former case expressly recognized that a condition in a taxing statute "unrelated to the fiscal need subserved by the tax in its normal operation or to any other end legitimately national" would be invalid. 301 U. S. at 591.

Equally invalid, we submit, is an attempt in a taxing or appropriation act provision to disregard the Bill of Rights or to secure to the Congress a power which belongs to one of the other branches of the Government. Constitutional safeguards may not be so lightly set aside or the constitutional framework of the Government so readily altered. Thus an appropriation act provision may not invade the pardoning power of the President or the judicial function of deciding cases (*United States* v. *Klein,* 13 Wall. 128); it may not invade the realm of the executive authorities in administering the expenditure of funds (*People* v. *Tremaine,* 252 N. Y. 27); and it may not be employed as a means of exercising the appointing power normally lodged in the executive. *State ex rel. Worrell* v. *Carr,* 129 Ind. 44. Likewise improper is the attempted exercise of the removal power by the legislature through appropriation act provisions withholding money from named officials. *Reid* v. *Smoulter,* 128 Pa. St. 324, 335–336; *People ex rel. Burby* v. *Howland,* 155 N. Y. 270, 279.

The matter is clearly expressed in *State ex rel. Tolerton* v. *Gordon*, 236 Mo. 142, 169-170, as follows:

> * * * If in the discharge of a duty imposed both by the Constitution and by the law the executive has exercised his prerogative by appointing to the office of Game and Fish Commissioner a person who in his judgment is faithfully performing his official duty, is it within the power of the Legislature to review the action of the executive and paralyze it by providing in an appropriation act that such appointee shall not receive compensation for his services in such office, although any other person may? If so, then the Legislature may designate, in an appropriation act for the payment of salaries, those who shall and those who shall not be entitled to compensation thereunder, and thus hamper the executive, not only in the exercise of the appointing power, but also in carrying out the mandate of the organic law in taking care that the laws are faithfully executed. Under the authorities cited it is clear that such power has not been granted to the lawmaking branch of the government. The Legislature has the undoubted power to make or to refuse to make an appropriation authorized by the Constitution, and it has the power to create or abolish an office when unrestrained by constitutional limitations, but it has not the

> power to say who shall not be compensated out of an appropriation for the payment for official services rendered, nor to say indirectly who shall be appointed to or removed from the office thus created.

We think the views thus expressed with respect to limitations upon the taxing and spending power must prevail if constitutional government is to survive. Therefore if it is true, as we contend, that the power to remove Federal executive officers belongs to the President and may not be exercised by the Congress, it follows that an appropriation act provision which attempts to exercise that power is equally as invalid as a direct legislative decree of ouster. Section 304 of the Urgent Deficiency Appropriation Act of 1943 must therefore fall.

C. WHETHER RESPONDENTS ARE DEEMED "OFFICERS" OR "EMPLOYEES" IS IMMATERIAL HERE

As already noted, the Constitution permits the Congress to vest the appointment of "such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments" (Art. II, Sec. 2, cl. 2). Under this clause it has uniformly been held that persons appointed by the President, the Courts of Law, or the Heads of Departments authorized by law to make such appointments, are "officers" of the

United States.[28] Respondent Lovett, therefore, was undoubtedly an "officer", since appointment to his position as Executive Assistant to the Governor of the Virgin Islands was vested by Congress in the Secretary of the Interior (R. 20; 49 Stat. 1813, 48 U. S. C. 1405v).[29] And while respondents Watson and Dodd were appointed by

[28] *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Hartwell*, 6 Wall. 385, 393–394; *United States* v. *Mouat*, 124 U. S. 303, 307; *United States* v. *Smith*, 124 U. S. 525, 532; *McGrath* v. *United States*, 275 Fed. 294, 300 (C. C. A. 2) appeal dismissed, 260 U. S. 709; *Collins* v. *United States*, 14 C. Cls. 568, 574; *Hoeppel* v. *United States*, 85 F. 2d 237, 241 (App. D. C.); *Callahan* v. *United States*, 122 F. 2d 216, 218 (App. D. C.).

[29] Respondent Lovett was also an inferior officer when he served up to October 12, 1943, as Government Secretary of the Virgin Islands (R. 19), since that appointment, although made by the President, was not one requiring confirmation by the Senate (49 Stat. 1812, 48 U. S. C. 1405t). In any event, the nature of the office of Government Secretary of the Virgin Islands is immaterial, for, while respondent Lovett held that office when Section 304 became law on July 12, 1943, the Act by its terms did not become operative until November 15, 1943, at which time respondent Lovett was serving as Executive Assistant to the Governor of the Virgin Islands.

Dr. Lovett's positions had the usual indicia of office, including "tenure, duration, emolument and duties fixed by law." See *Metcalf & Eddy* v. *Mitchell*, 269 U. S. 514, 520. His appointments were with tenure and duration; as Government Secretary, at the pleasure of the President, since no other tenure was specified; and as Executive Assistant, under the provisions of Section 23 of the Organic Act of the Virgin Islands (Act of June 22, 1936, 49 Stat. 1813, 48 U. S. C. 1405v) that "officers appointed by the Secretary of the In-

the Federal Communications Commission,[30] not one of the traditional Government departments (see *United States* v. *Germaine*, 99 U. S. 508; *United States* v. *Mouat*, 124 U. S. 303, 307), we believe that they too should be held to have been appointed by the "Head of a Department" within the meaning of the Constitution.

The opinion in *United States* v. *Germaine*, *supra*, was rendered in 1878, before the now-familiar independent agencies had been established. It used the phrase "Heads of Departments" with reference to the seven executive departments then in existence, as distinguished from the chiefs of bureaus or offices within those branches, and this use of the term was repeated in *United States* v. *Mouat*, *supra*. But since the establishment of "independent" agencies such as the Federal Communications Commission, a different situation has been created. Whether such agencies are "Departments" in the sense of Art. II, Sec. 2, cl. 1 must be judged not by their formal designations but by their essential nature. For the purposes of the constitutional provision here

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terior shall hold office during his pleasure." Both had duties fixed by law; the Organic Act, in Section 21, specifies the duties of the Government Secretary (48 U. S. C. 1405t); and Order No. 1870, issued by the Secretary of the Interior, September 6, 1943, pursuant to Section 23 of the Act, specifies the duties of the Executive Assistant. In each case, he took an oath of office (R. 19).

[30] (R. 24, 29; see Sec. 4 (f) of the Federal Communications Act of 1934, 48 Stat. 1067, 47 U. S. C. 154 (f).

involved we know of no considerations that would warrant treatment of such agencies otherwise than as "Departments". For these reasons the Attorney General ruled in 1933 that the Civil Service Commission is a "Department" in the constitutional sense; that the three Commissioners constitute the "Head of a Department"; and that Congress could and did confer upon them as such the power to appoint a chief examiner. 37 Op. A. G. 227. And, in *Emergency Fleet Corp.* v. *Western Union Telegraph Co.*, 275 U. S. 415, 418, 426, this Court characterized the various independent establishments as "minor independent departments". See also 40 Op. A. G. No. 73. We believe therefore that the Federal Communications Commission is a "Department" for the purpose here involved[31] and that respondents Watson and Dodd, having been appointed by its "Head", were not subject to direct removal by Congress, any more than was respondent Lovett.[32]

In any event, whether respondents Dodd and Watson were "officers" is immaterial here, for nothing in the Constitution or its background suggests that the power of Congress to remove "employees" is any greater than its power to remove "officers." Certainly the general source of the

[31] A contrary conclusion was reached in *United States ex rel. Crow* v. *Mitchell*, 89 F. 2d 805, 808 (App. D. C.).

[32] The positions of respondents Watson and Dodd had the usual indicia of an "office". See *Metcalf & Eddy* v. *Mitchell*, *supra*, n. 29. Both positions had tenure: respondent Wat-

Congressional power to provide for all these government positions is the same—the "Necessary and Proper" clause (Art. I, Sec. 8, cl. 18), and it would seem to follow that Congress possesses no greater power of removal in the one case than in other.

There is, moreover, no sound basis for contending that the word "officer" was intended to cover only positions of importance, for in the debates in 1789 it was pointed out that "the inferior officers mentioned in the Constitution are clerks and other subordinate persons". 1 Annals of Congress 372. See Story, *Commentaries* (5th ed. 1891), Sec. 1536. If the Congress had a direct removal power limited to "offices", it apparently could not remove, because they are "officers", a postal clerk (*Foshay* v. *United States,* 54 F. 2d 668 (S. D. N. Y.)), a mail carrier (*Waddle* v. *Hughes,* 260 Ky. 269), a penal guard (*Baskins* v. *United States,* 32 F. Supp. 518 (E. D. S. C.)), an investigator of the Alcohol Tax

son had occupied his position since November 16, 1941 (R. 24); and respondent Dodd had been in his position since December 22, 1942 (R. 29). Both respondents held office at the will of the Commission, subject to applicable general laws. The positions clearly were not temporary in a sense which would prevent respondents from becoming officers. Cf. *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Germaine*, 99 U. S. 508, 511; *Helvering* v. *Powers*, 293 U. S. 214, 224. In addition to tenure, the positions had emoluments, fixed by the authority of the Commission (R. 24, 30); respondents had fully specified duties and each took an oath of office (R. 24, 29).

Unit (*Brown* v. *Zerbst*, 99 F. 2d 745 (C. C. A. 5)), or an employee of the customs service (*Callahan* v. *United States*, 122 F. 2d 216 (App. D. C.). Such a strange result cannot be accepted as a proper construction of the Constitution. The only sensible conclusion is that no special removal power exists in Congress over "employees" as distinguished from "officers".

II. SECTION 304 OF THE URGENT DEFICIENCY APPROPRIATION ACT, 1943, IS UNCONSTITUTIONAL AS A BILL OF ATTAINDER

The President's message setting forth his objections to Section 304 (*supra*, n. 3) correctly characterized it as a bill of attainder. The permanent legislative disbarment of respondents by name from any future gainful Government employment falls plainly within the constitutional prohibition against bills of attainder.

Art. I, Sec. 9, cl. 3 of the Constitution provides that "No Bill of Attainder or ex post facto Law shall be passed."[33] The reasons for this flat prohibition lie in the evils of the English attainder practice with which the members of the Constitutional Convention were well acquainted. *Calder* v. *Bull*, 3 Dall. 386, 389.

A. BACKGROUND OF THE PROHIBITION AGAINST BILLS OF ATTAINDER

Attainder is a term derived from the English

[33] Art. I, Sec. 10, cl. 1 imposes the same prohibition upon the States.

common law and refers to the staining or blackening of the name and character of the person to whom it attaches. Upon sentence of death or outlawry, a person was attainted; the law set a mark of infamy upon him and withdrew from him all civil rights so that "He is no longer of any credit or reputation; he cannot be a witness in any court; neither is he capable of performing the functions of another man; for, by an anticipation of his punishment, he is already dead in law." IV Blackstone, *Commentaries*, pp. 380, 386, 387. "Attainder, in a strict sense, means an extinction of civil and political rights and capacities." Cooley, *Constitutional Limitations* (8th ed.), p. 536.

Attainder also involved forfeiture and corruption of blood so that one attainted could not retain or inherit or transmit land or other hereditaments. IV Blackstone, *Commentaries*, p. 388. However, at the time of the adoption of the American Constitution, forfeiture and corruption of blood were ceasing to be consequences of an attainder, which was then coming to involve predominantly civil and political rather than property disqualifications and disabilities. Stat. 5 Eliz., c. 1, c. 11; 18 Eliz., c. 1; 8 & 9 Wm. III., c. 26; 15 Geo. II, c. 28. As early as 1708 Parliament had provided for the practical abolition of corruption of blood for treason (Stat. 7 Anne, c. 21), although the operation of this statute was

subsequently postponed (Stat. 17 Geo. II, c. 39).[34] The elimination of corruption of blood and forfeiture as a consequence of attainder is reflected in Art. III, Sec. 3, cl. 2, of the Constitution, which provides that "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."

Disqualification to hold public office was also one of the consequences of attainder. *State* v. *Hastings,* 37 Neb. 96, 119, 55 N. W. 774, 781. This is the punishment which the Constitution provides for impeachment (Art. II, Sec. 4) and is commonly prescribed by state constitutions as a consequence of conviction of certain crimes. Mechem, *Public Offices and Officers,* secs. 77–80.

Prior to our Constitution there were many instances in English history of bills of attainder and bills of pains and penalties (the former prescribing punishment of death and the latter imposing a lesser penalty. *Cummings* v. *Missouri,* 4 Wall. 277, 323; *Calder* v. *Bull,* 3 Dall. 386, 389;

[34] The statute of 7 Anne, c. 21, was repealed by Stat. 39 Geo. III, c. 93, but this repealer was enacted in 1798, after the adoption of our Constitution. Corruption of blood was abolished in all cases except high treason and murder by Stat. 54 Geo. III, c. 145. Finally, in 1870 the enactment of Stat. 33 & 34 Vict., c. 23, abolished attainder, corruption of blood and forfeiture upon judgment of treason or felony (except forfeiture consequent upon outlawry) but retained disqualification from holding public office.

Cooley, *Constitutional Limitations* (8th ed.), p. 538). In enacting these bills, Parliament assumed the judicial function of imposing punishment for offenses, in some instances for acts which were not crimes when committed, without regard to the rules of evidence and without regard to the punishment provided by law for the offense involved. No trial was necessary and no opportunity of defense had to be afforded the accused. *Calder* v. *Bull,* 3 Dall. 386, 389; Pomeroy, *Constitutional Law,* sec. 503. A bill of attainder was properly regarded as far more reprehensible than attainder for judicial conviction of crime because it punished the victim and blackened his name and character without any of the safeguards of a fair trial afforded in judicial proceedings.

Usually bills of attainder were enacted by Parliament in times of rebellion or great political crisis, when aroused passions overrode considerations of fairness and justice. As Mr. Justice Story observed:

> * * * In such cases, the legislature asumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sover-

> eignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears or unfounded suspicions. * * * The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender." [II Story, *Commentaries on the Constitution* (5th ed.), Sec. 1344][35]

In prohibiting bills of attainder the members of the Constitutional Convention also had before them the several statutes enacted by the States during the Revolution, attainting loyalists for treason. Thus a Pennsylvania statute of 1778 described certain named persons as traitors and

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[35] An example of a bill of attainder enacted by Parliament prior to the adoption of our Constitution is "An act to inflict pains and penalties on Francis, Lord Bishop of Rochester" (Stat. 9 Geo. I, c. 17; 16 State Trials 323). The Act recited that the Bishop of Rochester was party to a conspiracy in 1721 to raise an insurrection against the Crown and to place a "popish pretender" on the throne, and provided that he should be deprived of all his offices and benefices ecclesiastical, should thenceforth be disabled and rendered incapable of taking or holding any office, benefice or employment within the realm or any dominion, of exercising any office or authority, ecclesiastical or spiritual, and should suffer perpetual exile and be forever banished from the realm and the dominions. For other examples, see the bills attainting the Earl of Clarendon (6 State Trials 318, 391) and the Earl of Strafford (3 State Trials 1382, 1518).

provided that if they should not submit themselves to a Pennsylvania court for trial before a specified date, they should be convicted and attainted of high treason (Pa. Laws 1778, c. 49; 1 Pa. Laws (Dall.), c. 784). Other Revolutionary statutes prescribed attainder for treason and imposed as a punishment disqualification from holding public office.[36] It has been generally recognized that these Revolutionary bills of attainder were within the Constitutional prohibition. *Cooper* v. *Telfair*, 4 Dall. 14, 19; Cooley, *Constitutional Limitations* (8th ed.), p. 539.

B. THE DECISIONS OF THIS COURT

Cummings v. *Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, are the leading authorities on what constitutes a bill of attainder within the constitutional prohibition. The *Cummings* case involved a provision of the Missouri Constitution of 1865 to the effect that any person who had engaged in hostility against or who had been disloyal to the United States or had ever

[36] See 1 Laws N. Y. 772, 7th Sess. (1784), c. 66; Georgia Acts of March 1, 1778, and May 4, 1782, Vol. 1, Revolutionary Records of Ga., pp. 326, 373; N. H. Act of November 28, 1778, N. H. Perpetual Laws (1789), p. 85; 1 Laws N. Y. 173, 3d sess. (1779) c. 25; 8 R. I. Colonial Records 609; *Cooper* v. *Telfair*, 4 Dall 14; *Lessee of Hylton* v. *Brown*, 1 Wash. C. C. 298, 307; *Lessee of Delancey* v. *McKeen*, 1 Wash. C. C. 354; *Thompson* v. *Carr*, 5 N. H. 511; *Sleght* v. *Kane*, 2 Johns. Cas. (N. Y.) 236; Belnap, *History of New Hampshire*, ch. 26; II Ramsay, *History of South Carolina*, p. 351; II Arnold, *History of Rhode Island*, pp. 360, 449.

been connected with any organization inimical to the Government of the United States should be disqualified from holding any public office or from acting as a teacher; and that no person should continue to hold public office or practice as an attorney or clergyman unless he took a prescribed oath that he had not engaged in hostility against or been disloyal to the United States. Cummings was a Catholic priest who was convicted by the Missouri court of preaching without having taken the prescribed oath. The *Garland* case involved the constitutionality of Federal statutes which required an individual as a condition of entrance upon the duties of any public office or practice as an attorney in the Federal courts, to swear that he had not engaged in hostility against the United States or accepted office under any authority hostile to the United States (12 Stat. 502; 13 Stat. 424). Garland took part in the rebellion and was a member of the Confederate Congress. He applied to the Supreme Court for permission to continue to practice law without taking the oath.

In both cases the provision in question was held to be unconstitutional as a bill of attainder. This Court recognized that a statute which merely prescribes qualifications for public office or for practicing a profession is constitutional, but held that the legislature cannot, in the guise of prescribing a qualification for office, in effect impose a punishment for an offense which was not pun-

ishable when it was committed; and that the statutes involved did, in prohibiting persons within their scope from holding public office or practicing a profession, in effect punish them for conduct not so punishable when committed. The Court held that disqualification from public office was a form of punishment under the circumstances involved. In the *Cummings* case this Court said (pp. 319–322, 325):

> * * * But it by no means follows that, under the form of creating a qualification or attaching a condition, the States can in effect inflict a punishment for a past act which was not punishable at the time it was committed. * * *
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> * * * The oath could not, therefore, have been required as a means of ascertaining whether parties were qualified or not for their respective callings or the trusts with which they were charged. It was required in order to reach the person, not the calling. It was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.

> * * * The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. * * *
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> The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty, and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law. Any deprivation or suspension of any of these rights for past conduct is punishment, and can be in no otherwise defined.

See pp. 377, 379, 380 of the *Garland* case for similar statements. The *Cummings* and *Garland* cases were reaffirmed in *Pierce* v. *Carskadon,* 16 Wall. 234, 239.

Under the doctrine of these cases, Section 304 is clearly unconstitutional as a bill of attainder, for its actual purpose and effect are not to prescribe qualifications for public office, but to punish respondents for their past views and associations. Removal from and disqualification to hold office—the effect of Section 304 upon respondents—is a

well-recognized form of punishment." *Ex parte Curtis,* 106 U. S. 371, 374; *Mackin* v. *United States,* 117 U. S. 348, 352; *Barker* v. *People,* 3 Cowen (N. Y.) 686; *Huber* v. *Reily,* 53 Pa. St. 112, 116; contra, *Gray* v. *McLendon,* 134 Ga. 224, 253, 67 S. E. 859, 872. Disqualification to hold office affixes to the party "an indelible disgrace" and makes the offense for which such punishment is provided infamous. *United States* v. *Waddell,* 112 U. S. 76, 82; *Ex parte Wilson,* 114 U. S. 417, 426; III Willoughby, *Constitutional Law of the United States* (2d ed.), sec. 692. Indeed, one of the punishments for treason, the highest crime of all, is removal from and disqualification to hold office (Const., Art. II, Sec. 4; 35 Stat. 1088, 18 U. S. C. 2).[38]

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[37] Of course, Congress has the right to prescribe any reasonable standard of fitness to hold public office, even though this operates to disqualify an incumbent who is unable to meet the prescribed qualifications. *Heim* v. *McCall,* 239 U. S. 175; *Crane* v. *New York,* 239 U. S. 195; *Hawker* v. *New York,* 170 U. S. 189; *Dent* v. *West Virginia,* 129 U. S. 114; see also *Ex parte Wall,* 107 U. S. 265; *Ex parte Curtis,* 106 U. S. 371. The qualifications required must, however, be objective, or general, and not personal in nature.

[38] Section 3 of the Fourteenth Amendment disqualifies from holding public office anyone who, having taken an oath as a state or Federal officer to support the Constitution, engages in insurrection or rebellion. By the Act of March 3, 1865 (13 Stat. 487, 490), deserters who failed to return to their regiments were disfranchised and disqualified from holding public office. State constitutions and statutes commonly impose disqualification from public office as punishment for crime: See, *e. g.*, Conn. Const., Art. VI, secs. 3, 4;

The fact that Section 304 does not in terms purport to impose punishment on respondents is not decisive; its constitutionality is to be tested by its actual effect upon respondents. As this Court observed in the *Cummings* case, *supra*, "The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding." (4 Wall. at p. 325.)

The disqualification imposed upon respondents by Section 304 extends throughout their lives.[39] It

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Del. Const., Art. II, sec. 21; Ga. Const., Art. II, sec. IV; Ky. Const., sec. 150; Neb. Const., Art. XV, sec 2; Kan. Gen. Stat. Ann. (1935), sec. 21-121; Mo. Rev. Stat. Ann. (1939), sec. 4341; Neb. Rev. Stat. (1943), secs. 28-811. See also Mechem, *Public Offices and Officers*, secs. 77-80; Stimson, *American Statute Law*, sec. 223.

[39] The "opinion of the court" below (at R. 36-37) characterizes as "irrelevant" the provision of Section 304 which forbids payment from other appropriations than those made in the Act itself of compensation for services rendered by respondents to "any department, agency, or instrumentality of the United States". We believe that the court's view is not tenable. The barrier of clause (2) of the Section (*supra*, p. 4) went into effect at the same time as the provision in clause (1) forbidding payment to respondents from the appropriation made in the Act. The two provisions are linked together in purpose and effect. If clause (2) cannot be

will continue to bar them from Federal service even though they may wholly alter the political views and associations attributed to them by the legislative sponsors of Section 304. In this respect Section 304 goes beyond even the test oaths formerly used in England and France, which were always limited to an affirmation of present belief or present disposition toward the government and were never exacted with reference to particular instances of past misconduct. *Cummings* case, p. 318. It is evident, moreover, that this legislative proscription impairs the ability of respondents to obtain employment even outside the Government, because of the importance which attaches to Congressional action, whatever its basis.

Section 304 bears no resemblance to a measure fixing qualifications for Federal office. The Section makes no reference to offices nor does it prescribe any qualifications for holding office. Section 304 strikes only at these three persons, and by name; it does not bar from office any other citizen even though he may entertain views or engage in activities far more "subversive" than those attributed to respondents by the special subcommittee. Section 304 was enacted "in order to reach the person, not the calling." *Cummings*

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challenged now, it could be litigated in the future only if some agency of the Government should see fit to employ one of the respondents in the teeth of the Section, and an action similar to this were then brought.

case, p. 320. Furthermore, while a statute fixing qualifications to hold office would be concerned with the qualifications of the applicant or incumbent at the time of taking or holding office, Section 304 imposes a permanent disqualification because of past facts, irrespective of qualifications which they may possess in the future.

That Section 304 was not designed to fix qualifications for government employment is strikingly brought out by contrasting it with Section 301 of the same Act. Section 301 provides that no part of any appropriation contained in the Act shall be used to pay the salary of any person "who advocates, or who is a member of an organization that advocates, the overthrow of the Government of the United States by force and violence" and provides that any such person who accepts salary paid from any appropriation made by the Act shall be guilty of a felony (57 Stat. 449, 450). That Section, unlike Section 304, operates equally upon all persons and expresses the judgment of Congress that anyone who advocates the overthrow of the Government by force or violence is not qualified for government service.

Section 304 is a bill of attainder even if construed as expressing merely the judgment of Congress that respondents are unfit to hold Federal employment. For, a characteristic of bills of attainder is that they involve the exercise of judicial functions by the legislature. "In these cases the

legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistry." *Cummings* case, p. 323. Section 304 squarely falls within this test. For Congress to decide, as it has done here, that three particular persons have expressed "subversive" views or have been associated with "subversive" organizations, and then to deal with them in a particular manner, is an exercise of the judicial function. Cooley, *Constitutional Limitations* (8th ed.), p. 185; *Prentis* v. *Atlantic Coast Line Company,* 211 U. S. 210, 226; *Reynolds* v. *McArthur,* 2 Pet. 417, 435; *Newland* v. *Marsh,* 19 Ill. 376, 383. This was recognized by Representative Cannon, Chairman of the Committee on Appropriations, when he stated that the function of the special subcommittee was "to authoritatively adjudicate all charges of disloyalty" of Federal employees (89 Cong. Rec. 711). "That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced" (*Ervine's Appeal,* 16 Pa. St. 256, 266).

Section 304 reflects disregard of accepted safeguards of fairness and justice embodied in judicial trials, such as gave rise to the historic objections to bills of attainder. Thus, respondents were not given a public trial, the hearings before the subcommittee being held in executive session

(R. 21, 26, 30–31). Cf. *Gaines* v. *Washington*, 277 U. S. 81; *Davis* v. *United States*, 247 Fed. 394 (C. C. A. 8). Respondent Dodd was denied the right "to be informed of the nature and cause of the accusation" prior to his appearance before the subcommittee (R. 30). Cf. *United States* v. *Cruikshank*, 92 U. S. 542, 558, 559; *United States* v. *L. Cohen Grocery Company*, 255 U. S. 81. No witnesses testified at the hearings before the subcommittee, and the information considered by the subcommittee (taken from prior investigations by the Federal Bureau of Investigation, the House Committee on Un-American Activities, and others) was not shown to respondents (R. 21, 27, 30–31). Cf. *Motes* v. *United States*, 178 U. S. 458, 467–471; *Kirby* v. *United States*, 174 U. S. 47, 55–61. Respondents were denied the assistance of counsel, who were not permitted to attend the subcommittee hearings even as observers (R. 21, 27, 30–31). Cf. *Glasser* v. *United States*, 315 U. S. 60, 76; *Johnson* v. *Zerbst*, 304 U. S. 458. Respondents were not afforded the opportunity to produce witnesses in their own behalf or to have the compulsory process of the subcommittee for obtaining witnesses (R. 21, 27, 31). Cf. *United States* v. *Cooper*, 4 Dall. 341; *Casebeer* v. *Hudspeth*, 121 F. 2d 914 (C. C. A. 10).

The fact that Section 304 does not charge respondents with having committed any crime or purport to punish them for having committed

any legal offense does not make it any the less a bill of attainder. One of the features of certain bills of attainder was that they imposed penalties upon victims who had not committed any crime. See Cooley, *Constitutional Limitations* (8th ed.), p. 537. See also Macaulay, *History of England*, c. 12. The statutes invalidated in the *Cummings* and *Garland* cases did not purport to impose punishment for crimes, but did in effect impose punishment for certain acts which were not punishable when committed. *Cummings* case, pp. 327, 328; *Garland* case, p. 377.

In our judgment, under the foregoing authorities, Section 304 is unconstitutional as a bill of attainder.

CONCLUSION

For the foregoing reasons, we submit that Section 304 is unconstitutional and that the judgments below should be affirmed.

Respectfully submitted.

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